IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

BRIEF OF *AMICUS CURIAE* ON APPELLATE PRACTICE OF THE NEW YORK COURT OF APPEALS ON CONSTITUTIONAL QUESTIONS.

April 22, 1955

PETER CAMPBELL BROWN,
Corporation Counsel of the City of New York.

LEO A. LARKIN,
SEYMOUR B. QUEL,
DANIEL T. SCANNELL,
HELEN R. CASSIDY,
of Counsel.

130 Chas. P. Young Company, 163 Front Street, New York 38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 20

JAMES R. ELLIS, as President of the Yonkers Committee for Peace, an unincorporated association,

Petitioner,

against

WILLIAM DIXON, et al., as members of the Board of Education of the City of Yonkers, etc.,

Respondents.

ON A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT.

BRIEF OF *AMICUS CURIAE* ON APPELLATE PRACTICE OF THE NEW YORK COURT OF APPEALS ON CONSTITUTIONAL QUESTIONS.

During the reargument of the instant appeal, questions were asked by the Court as to whether the petitioner had exhausted his remedy in the state courts before invoking the jurisdiction of this Court. We received permission to file a supplemental brief dealing with that question.

This proceeding was instituted by the petitioner in the Supreme Court, Westchester County, in a proceeding

under article 78 of the New York Civil Practice Act. The relief sought by the petitioner was an order directing the Yonkers School Board to permit the use of its school building for the meeting in question.

The Petitioner's application was denied by the Supreme Court, Westchester County. The petitioner appealed to the Appellate Division of the Supreme Court, Second Department, which affirmed the denial of the order and denied leave to appeal to the Court of Appeals. Thereafter the petitioner applied to the Court of Appeals for permission to appeal from the order of theAppellate Division. The Court of Appeals denied the petitioner's application without specifying the grounds of such denial, and the petitioner thereafter invoked the jurisdiction of this Court.

An appeal may be taken to the Court of Appeals as a matter of right from a final determination of the Appellate Division, where a constitutional question is directly involved. Where an appeal may be taken as a matter of right, the Court of Appeals lacks jurisdiction to grant leave to appeal.

New York Civil Practice Act, § 588, subd. 1(a), specifically provides for the appeal as of right on constitutional questions as follows:

> "§ 588. Appeal as of Right. Appeal to the court of appeals as of right lies only
>
> "1. from a judgment or order of the appellate division, provided that the judgment finally determine a special proceeding, and provided further that
>
> "(a) there be directly involved the construction of the constitution of the state or of the United States; * * *."

In order to take an appeal as of right, it is not necessary that the one seeking to appeal show that he must succeed on the appeal. In *Matter of Davega-City Radio* v.

Labor Board, 281 N. Y. 13 (1939), the Court of Appeals said (p. 19):

> "The appeal to this court is taken as of right on the ground that a substantial constitutional question is involved, as will presently appear. The fact that we decide the constitutional question against appellant does not make it the less a ground for appeal. No appellant should be required to insure that his answer to the constitutional question will be adopted by the court."

The provision dealing with appeals by permission specifically provides that such permission may not be obtained where a case is appealable as of right on constitutional grounds. Civil Practice Act, § 589 reads as follows:

> "§ 589. APPEAL BY PERMISSION. Appeal to the court of appeals by premission lies only
>
> • • • • •
>
> "3. either
>
> "(a) by permission of the appellate division granted before application to the court of appeals for permission to appeal, and in case of refusal of such permission, by permission of the court of appeals, or
>
> "(b) by permission of the court of appeals upon application made directly to that court from a judgment or order of the appellate division, or of the court of original instance, which is not appealable as of right only because it does not comply with provisions (a), or (b), or (c) of subdivision one of section five hundred and eighty-eight of this act."

The fact that the Court of Appeals cannot grant leave to appeal where the appeal may be taken as of right is confirmed by the following: COHEN and KARGER, *"Powers of the New York Court of Appeals,"* p. 352; *Nash* v. *Lang*, 300 N. Y. 626 (1950).

An appeal as of right to the Court of Appeals can be taken within sixty days after the service of a copy of the order of the Appellate Division appealed from. Civil Practice Act § 592, subd. 1, provides as follows:

> "§ 592. LIMITATIONS OF TIME; PROCEDURE TO OBTAIN PERMISSION TO APPEAL. Appeals and applications for permission to appeal to the court of appeals pursuant to this article shall be subject to the following limitations of time:
>
> "1. An appeal as of right to the court of appeals must be taken within sixty days after service upon the attorney for the appellant of a copy of the judgment or order appealed from and a written notice of the entry thereof. The party entering the judgment or order, or serving the notice of the entry thereof, shall not, however, be entitled to notice to limit his time to appeal."

A further provision of § 592 extends for an additional thirty days the time in which to appeal as of right to the Court of Appeals, where leave to appeal is denied on the ground that an appeal may be taken as a matter of right. This provision is contained in subd. 5(a) which reads as follows:

> "Notwithstanding any of the foregoing limitations
>
> (a) An appeal as of right to the court of appeals may be taken within thirty days after entry of an order denying an application for permission to appeal upon the ground that the appeal would lie as of right; * * *."

In any event, whether the petitioner was confined to the sixty-day period provided for in Subdivision 1 or had available the thirty-day extension period specified in Subdivision 5.A of § 592, the time in which to take an appeal as of right to the Court of Appeals has long since expired.

It is thus clear that the petitioner had an absolute right to appeal to the Court of Appeals and that he did not avail

himself of that right. Under those circumstances, it is pointless to speculate as to the reasons which prompted the denial by the Court of Appeals of the petitioner's motion for leave to appeal. For where a petitioner has failed to exhaust his remedies in the state courts, he cannot invoke the jurisdiction of this Court.

New York, April 22, 1955.

Respectfully submitted,

PETER CAMPBELL BROWN,
Corporation Counsel of the City of New York.

LEO A. LARKIN,
SEYMOUR B. QUEL,
DANIEL T. SCANNELL,
HELEN R. CASSIDY,
of Counsel.